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No. 08-55

IN THE

Supreme Court of the United States

LOGIX COMMUNICATIONS, L.P., DOING BUSINESS AS LOGIX COMMUNICATIONS, PETITIONER

v.

THE PUBLIC UTILITY COMMISSION OF TEXAS, PAUL HUDSON, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE PUBLIC UTILITY COMMISSION OF TEXAS, JULIE CAURTHERS PARSLEY, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS, BARRY SMITHERMAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PUBLIC UTILITY COMMISSION OF TEXAS, AND SOUTHWESTERN BELL TELEPHONE, L.P., DOING BUSINESS AS AT&T TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

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SUMMARY OF REPLY ARGUMENT

Based on over 150 years of precedent from this Court, one issue should not be in dispute. The words as used by the FCC control the interpretation of the FCC's rule defining a "Business Line" (the "Rule").

Consistent with this Court's guidance, Petitioner Logix focused on the precise text of the FCC's rule defining a Business Line, which is quoted in full in the Petition. Respondent AT&T, on the other hand, obscures the text of the FCC in its Brief in Opposition. Instead of quoting the Rule correctly, AT&T has cut-and-pasted the rule adding and deleting words to create a new and different rule. AT&T creates a rule that it likes. But, the rule AT&T creates is not the rule written by the FCC. It is the rule as drafted by the FCC when read completely and consistently that demonstrates the error to count residential lines within the tally of Business Lines and the error to include "lines" that are not switched access lines used to serve a business customer within that tally.

AT&T distorts its scorecard of decisions from other jurisdictions. First, AT&T erroneously disregards the statement from the United States Circuit Court for the District of Columbia in *Covad Communications Company v. FCC, 450 F.3d 528 (D.C. Cir. 2006)* – *that* "[a] business line is a loop that runs from the wire center to a business customer." – as *dicta*. Regarding other lower court and state regulatory rulings, Petitioner Logix acknowledged that a majority of such decisions favored AT&T's arguments. However, AT&T again overstated its scorecard. In addition to the District of Columbia Circuit Court decision above, substantive and at times exhaustive state commission

decisions and/or arbitrator reports in North Carolina, Oregon, and Oklahoma reach the same conclusions and interpretation of the FCC's Business Line definition as is advocated by Logix in this matter.

Finally, AT&T suggests process could control over a strict reading of the language. This argument of AT&T fails for two reasons. First, process does not trump the substantive requirements of the FCC as demonstrated by the Rule's definition of a Business Line. Second, process arguments made by AT&T misstate the record. The record demonstrates – as has been implemented elsewhere – whichever interpretation of the Rule the Court adopts there will be an objective and administratable process to implement it.

REPLY ARGUMENT

I. The FCC's Rule must be Interpreted as the FCC Drafted It, Not as One of the Respondent's Paraphrased and Redrafted It

As this Court has reiterated repeatedly, the words used by lawmaking and regulatory bodies have meaning. AT&T's flawed approach conflicts with over 150 years of U.S. Supreme Court precedent on statutory interpretation that makes clear that the interpretation of a statute or regulation "begins where all such inquires must begin: with the language of the statute itself."[1] Where the language is plain, "the sole

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[1] *United States v. Ron Pair Enterprises*, 489 U.S. 235, 241, 109 S.Ct. 1026, 1030, 103 L. Ed.2d 290 (1989) (*Ron Pair Enterprises*). See also *Estate of Cowart v. Nicklos Drilling, Co.* 505 U.S. 469, 475-476, 112 S.Ct. 2589, 2594, 120 L. Ed2d 379 (1992)(stating, "The controlling principle in this case is the basic and unexceptional rule

function of the courts is to enforce it according to its terms"[2] with the plain meaning being deemed to be conclusive except in rare cases.[3] Unless there is an explicit statement to the contrary, words are to be given "their ordinary and usual sense and with the meaning commonly attributed to them."[4] Finally and directly applicable here, the language will be reviewed in its entirety giving meaning to all provisions to effectuate the intent and policy of the whole.[5]

A. Respondent AT&T misstates the Rule by cutting and pasting different portions of the Rule together while omitting key language.

The relevant portion of 47 C.F.R. § 51.5, is as follows (with emphasis added):

> Business line. **A business line is an incumbent LEC-owned switched access line used to serve a business customer, whether by the incumbent LEC itself or by a competitive LEC that leases the line from the incumbent LEC.** The number of business

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that courts must give effect to the clear meaning of statutes as written.); *Landreth Timber Co. v. Landreth* 471 U.S. 681, 685, 105 S. Ct. 2297, 2301 (1985).

[2] *Ron Pair Enterprises*, 489 U.S. at 241, 109 S.Ct. at 1030. See *Caminetti v. United States*, 242 U.S. 470, 485, 37 S. Ct. 192, 194 (1917). See also *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254, 112 S.Ct. 1146, 1149-1150 117 L. Ed.2d 391 (1992)(stating that [w]hen the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete'." *quoting Rubin v United States*, 449 U.S. 424, 430, 101 S.Ct. 698, 701, 66 L.Ed.2d 633 (1981).

[3] *Rubin*, 449 U.S. at 430, 101 S. Ct. at 701; see also *Germain*, 503 U.S. at 253-254, 112 S. Ct. at 1149.

[4] *Caminetti* at 242 U.S. at 485-486, 37 S.Ct. at 194.

[5] *Boisdore*, 49 U.S. at 122.

> lines in a wire center shall equal the sum of all incumbent LEC business switched access lines, plus the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements. **Among these requirements**, business line tallies (1) **shall include only those access lines connecting end-user customers with incumbent LEC end-offices for switched services**, (2) shall not include non-switched special access lines, (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one **line**. For example, a DS1 line corresponds to 24 64 kbps-equivalents, and therefore to 24 "business lines."

A comparison of Logix's Petition and AT&T's Brief in Opposition with regard to the manner in which each has analyzed the Rule is telling. Logix's Petition is directly focused on a full, detailed review of the FCC's Rule. Beginning on Page 13 of Logix's Petition, Logix begins a sentence-by-sentence review of 47 C.F.R. § 51.5 that continues to Page 19. Over those six (6) pages, the Petition includes a detailed discussion of each sentence applying statutory rules of construction to demonstrate that:

i. The first sentence establishes three basic conditions for finding that a line qualifies as a "Business Line": (1) only a line **used to serve a business** customer (as opposed to residential) may be considered; (2) the **line must be a switched access line**; and (3) whether the line should be counted is not affected by whether it is served by SBC/AT&T or by a competitive local exchange carrier ("CLEC") leasing the line from

SBC/AT&T.

ii. The second sentence in the definition identifies which lines served by ILECs and CLECs should be candidates for meeting the Business Line criteria. "Incumbent LEC switched access lines" are candidates and for purposes of counting leased loops, the FCC looked to "the sum of all UNE loops connected to that wire center, including UNE loops provisioned in combination with other unbundled elements."

iii. The third sentence of the Business Line definition, which is tied to the second sentence by the language used, addresses what may and may not be included in "business line tallies" when applying the second sentence. "Among[6]

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[6] "Among" is defined as "in conjunction with" and/or "intermingled with". (emphasis added to citations below)

RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE - UNABRIDGED, Random House Inc. (2nd ed. 1987) AT 208. (The first definition states: "in, into, or through the midst of; in **association or connection with**; surrounded by.)

AMERICAN COLLEGE DICTIONARY, Random House Inc. (1958) at 212. (The first definition states: "in, into, or through the midst of; in **association or connection with**; surrounded by".)

OXFORD ENGLISH DICTIONARY, Oxford University Press (1971) at 215. (The first definition states: "In the mingling and assemblage of; hence, surrounded by **and association with**".)

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY - OF THE ENGLISH LANGUAGE -

these requirements" as they are contained in the second sentence, a valid count must meet the following: (1) The Business Line count must include only those lines connecting end-users to ILEC end-offices for "switched services." (2) The business line count "shall not include non-switched special access lines." And (3) when accounting for ISDN and other digital access lines, ILECs count "each 64 kbps-equivalent as one **line**." (as opposed to one **Business Line** as AT&T attempted to redraft the Rule).

iv. The fourth sentence includes an example showing how the lines would be counted if all of the requirements in the third sentence are met, i.e. whether a 64 kbps equivalent "line" constitutes a Business Line, rather than a "line" that would not be counted, depends on whether that line satisfies the evaluative criteria of the FCC's definition. If all 24 of the 64 kbps-equivalent lines on an incumbent's DS1 facility (1) are connected to an end-user business customer, (2) are providing switched services, and (3) are provided by either the ILEC or a CLEC leasing a UNE loop, then, applying the third requirement to each of the 24 lines, the DS1 facility will have 24 Business Lines pursuant to the FCC's definition because each of those 24 "lines" independently meet the evaluative criteria of the Rule.

UNABRIDGED, Merriam-Webster, Incorporated (2002) at 219. (The first definition states: "surrounded by : in the midst of : **intermingled with**.)

In contrast to Logix's detailed discussion of the Rule, AT&T relies on selective picking of words and phrases out of context of the full Rule. Page 4 of AT&T's Brief in Opposition shows numerous cutting and pasting of the Rule that gives an inaccurate reading of the words actually used by the FCC. For example, AT&T brief states:

> The FCC's rules states that incumbent LECs "shall account" for such loops "by counting *each* 64 kbps-equivalent" channel in the loops as one "business line".[7]

But, what the rule actually says in subpart three of the third sentence is:

> (3) shall account for ISDN and other digital access lines by counting each 64 kbps-equivalent as one **line**.

To get the interpretation it wants, AT&T changed the words and added the word "business" in front of the word "line" when the FCC chose not to do so. AT&T's rewriting of the rule changes the meaning.

The FCC's Rule supports Logix's position that once a transmission path if determined to be a "line", it then has to be determined if the "line" is a **switched access line used to serve a business** customer. Based on the language in the Rule, if the answer is 'yes', the line is a Business Line. If the answer is 'no', the line is not a Business Line. By cutting and pasting different parts of the Rule and decoupling other portions of the Rule, i.e. the second and third sentences

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[7] AT&T Brief in Opposition at 4.

that the FCC explicitly tied together, AT&T misquotes the Rule language. It is AT&T's version of the rule – **as compared to the FCC's Rule language** – that misses this key distinction.

The Rule requires that each 64 kbps-equivalent stands alone from a counting perspective as a single "line" to be evaluated separately to determine if that "line" meets the criteria of a "business line", i.e. is the "line" **used to serve** a **business customer** with a **switched access service**?

B. The Importance of the Words Used by the FCC is highlighted by AT&T's attempt to rewrite it.

The approaches of Petitioner Logix and Respondent AT&T are telling. Logix has focused on the words as used by the FCC as the keystone to interpreting the FCC's intent. Logix quotes the Rule in full, discusses the requirements of each sentence, and discusses how the FCC tied specific sentences together to reach a coherent and internally consistent result. AT&T disassembled the Rule within its textual discussion avoiding a review of the Rule in its entirety The result is a story that is consistent with the result AT&T seeks but not consistent with the words used by the FCC.

II. Respondent AT&T Understates the Relevance of Decisions that are Contrary to Its Position

AT&T also seeks to persuade the Court by arguing its version of a scorecard of lower court and state regulatory rulings. Logix specifically acknowledged in its Petition that the Fifth Circuit Court decision was consistent with the majority of

rulings on this issue. But, AT&T overstates its case.

First, AT&T completely disregards the statement from the United States Circuit Court for the District of Columbia in *Covad Communications Company v. FCC, 450 F.3d 528 (D.C. Cir. 2006)* – *that* "[a] business line is a loop that runs from the wire center to a business customer." – as *dicta*. This characterization is not correct. As AT&T admits at Page 3 of its Brief in Opposition:

> The FCC established its latest set of unbundling rules in its *TRRO* in February 2005. Those rules, including the business line rule, were upheld on appeal. *Covad Communications Company v. FCC, 450 F.3d 528, 541-546 (D.C. Cir. 2006).*

AT&T admits that the legality of the Business Line Rule was before District of Columbia Circuit Court. Given that that court was considering the legality of the Business Line rule, statements about what that Rule requires was germane to that decision. As explained in Black's Law Dictionary, obiter dictum is a remark "not directly upon the question before the court."[8] But, the meaning of the Business Line rule was directly before the court in *Covad Communications Company v. FCC* because that court could not reach a conclusion on the legality of the Rule without having an understanding of what the Rule requires. Instead, that court stated its reading of the Rule that "[a] business line is a loop that runs from the wire center to a business customer." *Id. at Covad Communications Company at 534.*

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[8] Blacks Law Dictionary (8th ed. 2004) (definition of obiter dictum) *quoting* William M. Lile et al., *Brief Making and the Use of Law Books* 304 (3d ed. 1914).

With regard to state regulatory rulings, AT&T overstated its position A review of state orders demonstrates that the majority of the state commissions did not engage in the complete process to interpret the language of the Rule. As an example, the Public Utility Commission of Texas' ("PUCT's") decision did not even reference the Rule when it decided to include residential loops in the Business Line count; and the PUCT only gave a passing reference to the Rule when it chose to include unused and data only capacity in the Business Line count.

A review of state commission rulings is also fluid. For example, the Oregon Commission's substantive ruling was released between the date of Logix's Initial Brief and Appellees' Response Briefs while the Parties were before the Fifth Circuit Court. AT&T seeks to discount the ruling of that commission because there was a subsequent approved settlement between the competitors and incumbent local exchange carrier in that region. But, a subsequent settlement does not change the fact that with the guidance of state commission decisions referenced by AT&T in its Brief in Opposition, the Oregon Commission held in favor of positions articulated by Logix here while finding that the North Carolina Commission had engaged in the most appropriate review of the Rule. *See pages 19-20 of Logix's Petition for a discussion of the orders from the North Carolina and Oregon Commissions.*

Finally, although AT&T seeks to discount the *Oklahoma TRRO Report* because that ruling was by that Commission's administrative law judge ("ALJ") and could be overturned by that commission on appeal, AT&T does not attack the extensive discussion and reasoning in that report nor acknowledge that the

Oklahoma Commission has let that report stand for over two (2) years.

III. AT&T Misstates the Record Regarding Administrative Burdens Implementing the Rule

In the Brief in Opposition at Page 13, AT&T goes outside the language of the Rule to argue that the objective for simplicity can only be achieved if its interpretation of the Rule is adopted. First, the Rule language speaks for itself. An objective favoring simple does not replace the Rule as written. Second, the statements of intent by the FCC in the *TRRO* explaining the use of Business Lines as a proxy for potential revenues support Logix in this matter. Third, AT&T misstates the record and ignores the fact that the Rule as discussed by Logix has been implemented elsewhere.

The record identified two different administratable, simple ways to implement the 64-kbps equivalency in the Rule correctly and appropriately.[9] As such, the goal to rely on data that is objective in order to have a workable process will be met without regard to the interpretation of the Rule adopted by this Court.

What the FCC did explain is that Business Line thresholds are the proxies used by the FCC for such potential competition. *TRRO ¶¶ 93 and 103.* The FCC found that "the record shows a correlation between the number of **business lines** and/or fiber collocations in a wire center and a revenue opportunity sufficient to lead to facilities duplication in the geographic area served

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[9] See *North Carolina TRRO Order* at 67-68.

via that wire center." *TRRO ¶ 43 (emphasis added).* The FCC used this proxy because these "revenue opportunities" arise primarily from the competitors' ability to serve a large number of business customers in the particular wire center (as opposed to residential lines). As a result, the tally of Business Lines does not include **all** lines, but rather only those **business** lines that would provide a useful proxy for determining where significant revenue opportunities may exist.

If the Court looks beyond the language of the Rule itself to the *TRRO* for guidance, these substantive provisions provide guidance behind the scope and purpose for the Business Line definition. Process does not define substance, and process can and will tend to itself. Workable and objective alternatives are available to state commissions once the substantive requirements are settled.

CONCLUSION

For the above reasons, Petitioner respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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